BEYOND RS2477—COUNTY ROAD LIABILITY

2014 UCIP RISK MANAGEMENT CONFERENCE

10 September 2014, 11:00 a.m., Loveland Living Planet Aquarium

Counties are exposed to liability risks associated with their roads in several different ways, the most prominent of which are for defects in designing and constructing roads and for acquiring and expanding the roadways themselves. What follows is a general primer on how roads are created, how liability arises, and the extent of liability. It is not exhaustive, and statutes dealing with roads are strewn throughout the Utah Code. This summary addresses only some of the more general highlights.

I. COUNTY ROADS

A. Creation

Nearly all county roads arose in one of three ways: (1) they were built on property purchased or condemned for that purpose by the county; (2) they were dedicated to a county as part of a development approval (e.g., roads approved through a subdivision); or (3) they were created by public use over time. This latter type of road has usually existed for years, both because it takes ten years of consistent public use to create it and because developments in land use law and population increases have made it considerably more unlikely that a property owner will allow the public to freely cross its property.

i. Roads created by purchase or condemnation

Utah law expressly authorizes counties to acquire property for public use, specifically for road right of ways, and to construct and maintain roads on them. Utah Code §§ 17-50-305 & -312. Counties are also authorized to acquire private property (though not through condemnation) to preserve designated transportation corridors (including alternative corridors) that they anticipate will be constructed within thirty years. Utah Code §§ 72-5-402 & -403. In addition to acquiring property to preserve transportation corridors, counties are also permitted to limit development in the corridors by regulation and maps. Utah Code § 72-5-403.

If a county obtains less than fee simple for a corridor or to preserve a corridor, the property owner may petition the county to take the entire fee. Similarly, a property owner whose development is restricted because it lies in a corridor may petition the county to take the property (but less than the entire fee). If the county refuses, the restrictions will not apply to the development. Utah Code § 72-5-405.

ii. Roads created by explicit dedication

These roads usually arise in the context of subdivision approvals. When the final subdivision plat is recorded, all the public streets that appear in the plat are deemed dedicated to the public and are owned by the county. Utah Code § 17-27a-607. (Note that R.S. 2477 roads were also dedicated to the state. Utah Code § 72-5-301.)

A county's general plan showing anticipated roads is usually advisory, only. However, counties are prohibited from constructing or authorizing the construction of streets unless they conform to the general plan. Utah Code § 17-27a-406. Counties are not obligated to immediately acquire property for roads appearing on the general plan, and a road's appearance on the plan does not, by itself, require a landowner to dedicate it to the county and construct it. Requiring a landowner to dedicate and construct a road still must satisfy the requirements for a legal exaction. Utah Code § 17-27a-407.

iii. Roads created by consistent public use

Except in highly developed areas, most county roads fall into this category. Roads used continuously by the public for ten years are considered dedicated and abandoned to the public, creating a state right of way. (Curiously, the statute lists only the state as the owner of the right of way, not counties or cities.) The scope of a road created this way is what is considered reasonable and necessary to ensure safe travel. Utah Code § 72-5-104. In my experience, that is usually considered to be the current dimensions of the road.

B. Road Classifications

Public roads in Utah are classified as A, B, C, or D roads. State roads are class A and city roads class C. The roads counties typically deal with are class B and D roads. The county executive is charged with determining what county roads exist and keeping plats and descriptions of them in the office the county clerk or recorder. Clerks and recorders are prohibited from removing a designated county road from a plat unless the county's legislative body has formally vacated it. Utah Code § 72-3-107. County roads have whatever width county sets. Utah Code § 72-5-108. Utah's counties typically set the width of the right of way for class B roads at sixty-six feet and for class D roads at the width of the existing use. Roads that arose from R.S. 2477 dedications are presumed to have a sixty-six-foot right of way. Utah Code § 72-5-302. The county attorney is charged with determining the priority of public use for county roads, which may be instigated at the written request of ten taxpayers. Utah Code § 72-3-106.

A county road may be located within or pass through a city or town, but there cannot be more than three in the same direction. Utah Code § 17-50-305. Those roads and portions of roads are subject to the city's or town's laws. Otherwise, counties are statutorily authorized to make laws regarding the use of county roads. Utah Code § 17-50-309.

The state has "temporarily" granted to counties rights of way that passed over state lands that existed prior to 1992. The grants remain in effect until the county follows an application process to be granted a permanent easement. The applications must meet differing burdens depending on the status of the underlying state land (e.g., for SITLA land, a permanent easement must further SITLA's charter). Utah Code § 72-5-203.

More information about class B and D roads follows.

i. Class B roads

All public roads outside of municipal boundaries that have been designated as county roads are class B roads. Utah Code § 72-3-103. The county and the state share a joint undivided interest in the title to class B roads. The county, however, has sole jurisdiction over the roads and is required to construct and maintain them. *Id.*

ii. Class D roads

This classification is the catchall for all the other public roads found in the county that are not state or municipal roads. In other words, these are public roads outside of municipal boundaries that were not designated as county roads. The counties were required by statute to prepare maps showing the roads as of 1976 (i.e., when R.S. 2477 was repealed), and to update those maps as additional class D road are located or established. The maps are sent to UDOT, which scribes them onto their county maps. UDOT is statutorily absolved for any inaccuracies in the maps. Utah Code § 72-3-105. As with class B roads, a county shares joint undivided interest in the title to the roads with the state, but has sole jurisdiction over the class D roads in the county. *Id.*

C. Vacation

Once a public road is established, it remains a public road until it has been formally abandoned or vacated (by ordinance, resolution, or a court order) and the vacating instrument is recorded. Utah Code § 72-5-105. A county may temporarily close a road for no more than two years without abandoning it, but the closure must be done by a formal ordinance, reauthorized annually, and is limited to situations when closure is necessary to correct or mitigate harm to nearby property. If the road is an R.S. 2477 road, an acceptable alternative route must also be provided and memorialized. *Id.*

Counties are authorized to abolish, abandon, vacate, narrow, and change the names of county roads. But when doing so they must observe applicable procedural requirements, like giving proper notice, and cannot impair property owners' rights-of-way and easements or a public utility's franchise. Utah Code §§ 17-50-305; 72-3-108. Private landowners adjacent to, or

exclusively serviced by, a county road may also petition a county to vacate it. If, upon a hearing, a county determines that the petition is supported by good cause and the vacation will not injure the public or any person's interest, it may adopt a vacation ordinance that becomes effective when recorded. Utah Code § 17-27a-609.5.

Unless the vacated road was dedicated under R.S. 2477, the vacation removes both the county's and the state's rights of way. Utah Code § 72-3-108. The right of way for a road dedicated under R.S. 2477 reverts to the state, which shares title with the county. Utah Code § 72-5-305.

Special rules apply to grants of property from the federal government to private landowners when the land granted includes a public highway. If the highway has not been platted or continuously used by the public for ten years, the landowner has three months from the conveyance to file a claim for damages (i.e., a takings claim) with the county executive. That notice gives the county three months to start condemnation proceedings to keep the road as a public highway. If the county does not act with three months after notice, the road is considered abandoned. If the landowner fails to file a claim within three months, it is barred from bringing a claim for damages. Utah Code § 72-5-107.

II. COUNTY ROAD LIABILITY

Liability arising from a county's roads usually appears in two forms: liability for injuries that occur when someone uses the road (e.g., vehicle accidents allegedly caused by a defective road condition) or injuries that occur when the county constructs, improves, or maintains a road (e.g., property damaged by flooding or a taking). Generally, counties are not immune from suits for injuries arising from their roads, except for injuries related to latent defects or discretionary functions.

A. Injuries resulting from use

Dedicated roads do not impose liability on counties until they are improved. Utah Code § 17-27a-607. After improvement, counties become liable for their roads except when statutorily limited. Governmental entities are "charged with the nondelegable duty to exercise due care in maintaining streets and sidewalks within their … limits in a reasonably safe condition for travel." *Murray v. Ogden City*, 548 P.2d 896, 897 (Utah 1976). Although Utah has explicitly waived county immunity for injuries caused by defective, unsafe, or dangerous road conditions, it has carved out latent defects and dangers from that general waiver. Utah Code § 63G-7-301. Whether a defect is latent is usually a fact question. *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 26, 42 P.3d 379. Utah counties also remain liable for negligence, Utah Code § 63G-7-301, which consequently is often used by plaintiffs to attempt to avoid immunity.

Roads dedicated under R.S. 2477 present a special category not subject to the standard immunities and waivers. In fact, counties remain immune from injuries or damages associated with R.S. 2477 roads. Nor are counties liable to improve, maintain for vehicular travel, or place traffic signs on R.S. 2477 roads. Utah Code §§ 72-5-303 & -306. If a county chooses to maintain an R.S. 2477 road, it must prioritize the projects using its judgment and expertise (i.e., its discretionary authority). If R.S. 2477 roads are not classified as A, B, or C roads, then users travel them at their own risk. Utah Code § 72-5-306.

Liability for injuries arising from citizens' use of public roads has been a fertile field for litigation, and there are many court opinions addressing the topic. A selection follows.

- *Johnson v. UDOT*, 2006 UT 15, 133 P.3d 402: Affirming the rejection of discretionary function immunity for UDOT's decision to use plastic barrels instead of concrete dividers in a construction zone because there was no evidence of policy studies or analysis supporting the decision.
- *Price v. Amtrak*, 2000 UT App 333, 14 P.3d 702: Although state and local governments "have the responsibility to regulate and provide warning to automobile traffic at railroad crossings," the court held the city had discretionary function immunity because it exercised policy evaluation, judgment, and expertise in attempting to balance access and safety concerns in determining what warning devices to install.
- *Trujillo v. UDOT*, 1999 UT App 227, 986 P.2d 752: Rejecting the application of discretionary function immunity for a traffic control plan and decision to use empty barrels rather than concrete barriers to separate traffic because they were not undertaken as a result of policy evaluation, judgment, and expertise.
- *Keegan v. State*, 896 P.2d 618 (Utah 1995): Reversing denial of discretionary immunity for UDOT's decision not to raise barrier height after resurfacing project based on finding, *inter alia*, that UDOT had conducted studies on cost and safety.
- *de Villiers v. Utah County*, 882 P.2d 1161 (Utah Ct. App. 1994): Recognizing that governmental entities generally have no duty to maintain unobstructed visibility at an intersection or to install signs or signals, but once they provide traffic control devices, the devices "must be adequate and must be maintained in a nonnegligent fashion."
- *Braithwaite v. West Valley City Corp.*, 860 P.2d 336 (Utah 1993): Finding a jury question whether city breached "its obligation to provide reasonably safe conditions for pedestrian travel" when it allowed a property owner to build a fence abutting the pavement of a street with no sidewalk.
- *Trapp v. Salt Lake City Corp.*, 835 P.2d 161 (Utah 1992): Rejecting the application of the public duty doctrine to avoid the city's liability for a defective sidewalk.
- *Duncan v. Union Pacific Railroad*, 790 P.2d 595 (Utah Ct. App. 1990): Explaining that decisions to spend funds for highway maintenance and improvement are usually

discretionary and upholding immunity for state's decision not to install an electrified rail crossing.

- *Gleave v. Denver & Rio Grande Western Railroad Co.*, 749 P.2d 660 (Utah Ct. App. 1988): Holding that UDOT's decision not to install different safety signals or devices at a railroad crossing was a discretionary function, rendering it immune from suit.
- *Bigelow v. Ingersoll*, 618 P.2d 50 (Utah 1980): Holding that the state was not immune from an action alleging negligence in designing a traffic control system under the discretionary function exception.
- *Murray v. Ogden City*, 548 P.2d 896 (Utah 1976): Finding a jury question as to whether city should have foreseen that a lid on an abandoned water meter hole in a sidewalk should have been more securely fastened.
- *Carroll v. State*, 496 P.2d 888 (Utah 1972): Refusing to find that a roads supervisor's decision to use only earthen berms to indicate a closed road was a discretionary function.
- *Velasquez v. Union Pacific Railroad Co.*, 469 P.2d 5 (Utah 1970): Holding that, even if the absence of proper signage at a railroad crossing was considered a road defect, the state was immune because it was statutorily authorized to use its discretion to determine appropriate signage.
- *Stevens v. Salt Lake County*, 478 P.2d 496 (Utah 1970): Rejecting plaintiff's claim that weeds on private property obstructing the view of a county road constituted a dangerous or defective condition of the road.
- *Wilson v. Salt Lake City*, 371 P.2d 644 (Utah 1962): The court held that there was sufficient evidence to submit the question to a jury whether a manhole cover's defective condition existed sufficiently long that the city should have discovered and corrected it before the accident at issue.
- *Nyman v. Cedar City*, 361 P.2d 1114 (Utah 1961): Holding city liable for failing to place some sort of cautionary devices around a pile of dirt and concrete left in the street from a road construction project.

B. Injuries resulting from construction and improvement

These are usually property injuries, where a county's establishment, improvement, or maintenance of a road physically damages or takes real property or improvements. Claims based on incidental damage to property that was not otherwise put to public use typically arise as negligence actions, and are treated like other types of negligence actions.

Activities Utah's courts have held governmental entities liable for property damage related to road construction and improvement are:

- Failing to seal joints in a storm drain pipe, *Vincent v. Salt Lake County*, 583 P.2d 105, 107 (Utah 1978) (rejecting claim that defect was latent);

- "[P]reparing of plans and specifications and the supervision of the manner in which the work was carried out," *Andrus v. State*, 541 P.2d 1117, 1120 (Utah 1975) (addressing flooding);
- "[D]efective or negligent execution of … plans," *Morris v. Salt Lake City*, 101 P. 373, 376, 377 (Utah 1909) (addressing death of property owner's trees);

But courts have recognized governmental entities' immunity, or at least lack of liability, for:

- "The decision to build [a] highway and specifying its general location," *Andrus*, 541 P.2d at 1120 (applying discretionary function exception);
- Determinations as to "how [their] plans shall be executed" or "any defect in planning a public improvement," *Morris*, 101 P. at 376;
- "[E]stablishing street or sidewalk grades," *Morris*, 101 P. at 377;

Regarding roads dedicated under R.S. 2477, be aware that counties entering into agreements regarding those roads for any reason other than maintenance run the risk of voiding those agreements if they do not give notice to all the other counties through which the road extends. After receiving notice, a county has an opportunity to object. If a county objects to the agreement, the district court is authorized to resolve whether the agreement materially affects the objecting county's interests. If notice is not given, the agreement is void. Utah Code § 72-5-307.

Claims for injuries where a county has taken property for public use or inflicted a material depreciation in value (by, for example, constructing or widening a public road) are treated very different. (Note: This analysis does not address regulatory takings, which would rarely, if ever, arise with regard to the construction, improvement, or maintenance of public roads.)

i. Takings

Not only has immunity been waived for takings actions, but property owners are also not required to comply with notice of claim requirements, Utah Code §§ 63G-7-301 & -302, meaning that the statute of limitations for such claims is years longer than the typical one year to bring an action against a county. Although state law requires counties to develop specific review processes for takings claims, property owners are not required to follow them. Utah Code § 63L-4-301. Takings claims may be brought directly against the county under article I, section 22 of the Utah Constitution. *Heughs Land, L.L.C. v. Holladay City*, 2005 UT App 202, ¶ 9, 113 P.3d 1024 (holding article I, section 22 self-executing and not subject to Governmental Immunity Act limitations). The measure of damages for a taking is usually fair market value based on the property's highest and best use. *See, e.g., City of Hilldale v. Cooke*, 2001 UT 56, ¶¶ 19-23, 28 P.3d 697. While that might not be much for agricultural land without water rights

located far from a metropolitan area, it also might be hundreds of thousands of dollars for property located in areas set aside for high density or commercial use.

Counties can avoid much of the risk of takings claims by acquiring property through negotiated assignments and lawful condemnation, but they consistently encounter a specific brand of takings when imposing development requirements: exactions. Exactions are promises governments obtain from developers to make certain improvements to mitigate the impact of their developments in exchange for approving their development permits. Counties are allowed to impose exactions, but there must be an "essential link" between the exaction and a legitimate government interest, and the exaction must be roughly proportionate (i.e., equivalent) to the development's impact in its nature and extent. Utah Code § 17-27a-507. Utah's courts have interpreted this standard to require a nearly dollar-for-dollar equivalency of the cost of the exaction to the developer to the cost to the government to mitigate the development's impact. *See* *B.A.M. Development, L.L.C. v. Salt Lake County*, 2008 UT 74, 196 P.3d 601.

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